Menteri Dalam Negeri Malaysia & Ors v Chandran a/l Balurao

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO BA-44–127–04 OF 2021
NURULHUDA NUR'AINI JC
20 OCTOBER 2021

Criminal Procedure — Habeas corpus — Application for — Applicant arrested under s 3(1) of Dangerous Drugs (Special Preventive Measure) Act 1985 ('the Act') — Deputy Minister issued detention order under s 6(1) of the Act — Whether hearing of representation by applicant before advisory board and recommendation by the board to YDPA was made after three months permitted by s 10(1) the Act — Dangerous Drugs (Special Preventive Measure) Act 1985 ss 3(1) & 10(1) — Federal Constitution art 151 — Holidays Act 1951 — Interpretation Acts 1948 & 1967 s 54

The applicant was arrested on 21 September 2020 under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and the detention order under s 6(1) of the Act was issued by the Deputy Minister on 12 November 2020. The representation before the advisory board was held online on 10 February 2021 and at the conclusion thereof, the advisory board made their recommendation to the YDPA on 15 February 2021. On 18 February 2021, the YDPA agreed that the detention order be proceeded with. The applicant had filed an application for habeas corpus premised on, inter alia, the issue that hearing of the representation by the applicant before the advisory board and the recommendation by the advisory board to the YDPA was made after three months permitted by s 10(1) the Act. Therefore, there was a breach of the said section and art 151 of the Federal Constitution. The applicant had also raised an objection on the amended affidavit in reply filed by the respondent which the applicant submitted had been done after the close of pleadings.

Held, allowing the application for writ of habeas corpus and ordering that the applicant to be set free forthwith:

(1) As habeas corpus was a trial by affidavit and the contents of the affidavits were significantly important, any mistakes in the affidavit must be properly explained and rectified. As there was no proper explanation as to how the mistake occurred coupled with the fact that it was done after pleadings had been closed, the court rejected the said amended affidavit (see para 10).

(2) Nothing was deposed by the board secretary as to whether *Borang 1* was in fact faxed on 13 November 2020 and the time the fax was received by

the advisory board. In absence of a more credible evidence, the court was not able to accept the averment that the convenient speed the advisory board could act on the *Borang 1* was on the 16 November 2020 (see paras 14–15).

(3) Section 10 of the Act used the word 'within three months from the date of receiving such representation'. For this reason, the respondent ought to have been aware the significance of the date and time. Further, there were nothing in the Interpretation Acts 1948 and 1967 ('the IA') and the Holidays Act 1951 which stipulated that the first weekly holiday (being saturday) would be taken as 'excluded day'. Section 54 of the IA only catered for the last day being a weekly holiday to be termed as 'excluded day'. Therefore, for the respondent to argue that the first weekly holiday saturday and sunday to be eliminated from the calculation of the three months limitation under s 10(1) of the Act was not supported by any provisions of the law. Even taken the worst case that *Borang 1* was faxed very late in the evening, the three months calculation should begin from saturday 14 November 2020 and not 16 November 2020. Thus, when the advisory board sat to hear the representation on 10 February 2021, it was the 89th day and the recommendation to YDPA on 15 February 2021 was therefore made beyond the three months permitted time frame under s 10(1) of the Act. There was merit in the issue raised by the applicant (see paras 17 & 21–23).

[Bahasa Malaysia summary

Pemohon telah ditahan pada 21 September 2020 di bawah s 3(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta tersebut') dan perintah tahanan di bawah s 6(1) Akta tersebut dikeluarkan oleh timbalan menteri pada 12 November 2020. Representasi di hadapan lembaga penasihat telah diadakan secara dalam talian pada 10 Februari 2021 dan pada penghujungnya, Lembaga penasihat telah membuat syor kepada YDPA pada 15 Februari 2021. Pada 18 Februari 2021, YDPA bersetuju bahawa perintah penahanan diteruskan. Pemohon telah memfailkan permohonan untuk habeas corpus berdasarkan, antara lain, isu bahawa pendengaran representasi oleh pemohon di hadapan lembaga penasihat dan syor oleh lembaga penasihat kepada YDPA telah dibuat selepas tempoh tiga bulan yang dibenarkan di bawah s 10(1) Akta tersebut. Oleh itu, terdapat pelanggaran seksyen tersebut dan perkara 151 Perlembagaan Persekutuan. Pemohon juga telah membangkitkan bantahan terhadap afidavit jawapan terpinda yang difailkan oleh responden yang mana pemohon berhujah bahawa ia telah difailkan selepas penutupan pliding.

Diputuskan, membenarkan permohonan untuk writ habeas corpus dan memerintahkan pemohon dilepaskan dengan serta-merta:

(1) Memandangkan habeas corpus adalah perbicaraan melalui afidavit dan

kandungan afidavit adalah penting, apa-apa kesilapan dalam afidavit mesti dijelaskan dan diperbetulkan dengan elok. Memandangkan tiada penjelasan yang elok tentang bagaimana kesilapan tersebut berlaku ditambah pula dengan fakta bahawa ia dilakukan selepas pliding telah ditutup, mahkamah menolak afidavit terpinda tersebut (lihat perenggan 10).

(2) Tiada apa-apa yang dikemukakan oleh setiausaha lembaga berkenaan sama ada Borang 1 sememangnya telah difakskan pada 13 November 2020 dan masa faks tersebut diterima oleh lembaga penasihat. Dengan ketiadaan keterangan lain yang kredibel, mahkamah tidak dapat menerima hujahan bahawa tempoh selesa untuk lembaga penasihat bertindak ke atas Borang 1 adalah pada 16 November 2020 (lihat perenggan 14–15).

(3) Seksyen 10 Akta tersebut menggunakan perkataan 'dalam masa tiga bulan dari tarikh penerimaan representasi itu'. Atas sebab ini, responden sepatutnya menyedari kepentingan tarikh dan masa tersebut. Tambahan pula, tiada apa-apa pun dalam Akta Tafsiran 1948 dan 1967 ('AT') dan Akta Hari Kelepasan 1951 yang menetapkan bahawa cuti mingguan pertama (iaitu hari sabtu) akan diambil sebagai 'hari terkecuali'. Seksyen 54 AT hanya menyatakan hari terakhir sebagai cuti mingguan untuk diistilahkan sebagai 'hari terkecuali'. Oleh itu, hujahan responden bahawa cuti mingguan pertama sabtu dan ahad terkecuali daripada pengiraan had tiga bulan di bawah s 10(1) Akta tersebut tidak disokong oleh mana-mana peruntukan undang-undang. Walaupun dalam keadaan paling teruk di mana Borang 1 difakskan pada lewat petang, pengiraan tiga bulan harus bermula dari sabtu 14 November 2020 dan bukan 16 November 2020. Justeru, apabila lembaga penasihat bersidang untuk mendengar representasi pada 10 Februari 2021, ia adalah hari ke-89 dan oleh itu syor kepada YDPA pada 15 Februari 2021 telah dibuat melebihi tempoh tiga bulan yang dibenarkan di bawah s 10(1) Akta tersebut. Terdapat merit dalam isu yang dibangkitkan oleh pemohon (lihat perenggan 17 & 21–23).]

Legislation referred to

Dangerous Drugs (Special Preventive Measure) Act 1985 ss 3(1), 6(1) 10, 10(1)
Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 Form 1
Federal Constitution art 151
Holidays Act 1951 ss 2, 10(1)
Interpretation Acts 1948 and 1967 ss 54, 66

Naizatul Zamrina (KL Chee & Co) for the applicant.
Senior Federal Counsel Farah Ezlin (Anasuha Atiqah with her) for the respondent.

Nurulhuda Nur'aini JC:

[1] The applicant was arrested on 21 September 2020 under s 3(1) of the Dangerous Drugs (Special Preventive Measure) Act 1985 ('the Act').

[2] The detention order under s 6(1) of the Act on the applicant, for him to be detained at the Pusat Pemulihan Akhlak, Simpang Renggam, Johore, for a period of two years commencing from 12 November 2020 was issued by the Deputy Minister dated on the same date and served on the applicant similarly on the same date.

[3] The detention order together with the statement of facts and Borang 1 was served on the applicant by Inspector Nor Izzati Abdul Rahman as per encl 10, on 12 November 2020 and explained to the applicant in Tamil with the assistance of L/Kpl Visalan Kutty a/l Letchumanan. The service was acknowledged receipt by the applicant with his signature on the said order.

[4] The representation before the advisory board was scheduled on a few dates but adjourned due to various reasons. The representation before the advisory board was finally held online on 10 February 2021 as deposed by the secretary to the board in encl 18. The sitting proceeded on the said date without the applicant represented by counsel. No witnesses were called by the applicant.

[5] At the conclusion of the representation and upon considering the said representation, the advisory board made their recommendation to the YDPA on 15 February 2021. On 18 February 2021, the YDPA agreed that the detention order be proceeded with.

ISSUES RAISED BY APPLICANT

[6] Before hearing the issues raised by the applicant, this court had to deal with the objection raised by counsel for the applicant on the amended affidavit in reply filed by the respondent which applicant submitted have been done after the close of pleadings. The respondent on the other hand, argued that the filing of the said amended affidavit was done to enable this court to deal with the issues in just and fair manner.

[7] This court noted that based on the minutes of the proceeding, both parties had, on 2 September 2021 agreed that the pleading be closed as there were no further affidavits that needed to be filed by either party. On this consensus, a hearing date for the habeas corpus application was fixed on 30 September 2021.

[8] However, on 21 September 2021, the respondent had filed an amended affidavit encl 24. This was done after counsel for the applicant had put in the written submission. It is on this basis that the counsel for the applicant raises the objection. This court is of the view, the decision to put in further amended affidavit after the close of pleadings draws an inference that the party who had put in the said affidavit behaved unethically and against the professional standard of decorum, albeit the affidavit was to change the date deposed earlier in one of the respondent's affidavits.

[9] This court, having looked further, at the said amended affidavit filed by the respondent which was objected to by the applicant, contain an error on the deposition by the deponent when a new mistake was found in the amended affidavit which was said to explain the basis for the amendment proposed to be made. The mistake in the earlier affidavit was to the date which was typed as '4 March 2020' when it should read as '14 November 2020'.

[10] However, the next paragraph in the amended affidavit to explain how the error came about deposed that the mistake was to the identity card number of the applicant, a totally different mistake than that was proposed to be amended. As habeas corpus is a trial by affidavit and the contents of the affidavits are significantly important, any mistakes in the affidavit must be properly explained and rectified. As there was no proper explanation as to how the mistake occurred coupled with the fact that it was done after pleadings have been closed, this court rejected the said amended affidavit.

ISSUES RAISED BY THE APPLICANT

[11] The applicant raised seven issues. This court having heard the submissions of parties and having looked at the affidavits supporting and contesting the applicant, found that the first issue itself is with merit and ordered for the writ of habeas corpus to be issued.

[12] The first issue raised is that hearing of the representation by the applicant before the advisory board and the recommendation by the board to the YDPA was made after three months permitted by s 10(1) the Act. Therefore, a breach of the said section and art 151 of the Federal Constitution.

[13] Below are the crucial dates as extracted from the affidavits and the exhibits annexed:

> Affidavit of Wan Mohd Iftitah (Penguasa Penjara Pusat Pemulihan Akhlak Simpang Renggam):
>
> 13.11.2020: 'Pemohon serah 2 salinan 'Borang 1' bersama catatan representasi kepada saya lewat petang'.

13.11.2020: 'hari yang sama faks ke Lembaga Penasihat'.

Affidavit of Azrul Hafriz Bin Azman (secretary to the Board):

16.11.2020: 'Borang 1' diterima secara rasmi oleh Lembaga pada 16.11.2020 (Isnin) kerana 14.3.2020 dan 15.11.2020 (hari Sabtu dan Ahad) cuti hujung minggu Putrajaya'.

10.2.2021: Representation proceeded via on-line.

15.2.2021: recommendation made to YDPA

[14] Nothing was deposed by the board secretary Mr Azrul, as to whether *Borang 1* was in fact faxed on 13 November 2020 and the time the fax was received by the board. In addition, as to what 'lewat petang' is, it is not known as the deponent Mr Wan Mohd Iftitah had assumed that all parties would agree with it when in fact, the time is 'the fact in issue' in this application for a writ of habeas corpus. Furthermore, nothing was deposed by Mr Iftitah when the said form was in fact sent by fax to the board nor was the fax transmission report annexed as exhibit to the affidavit to show this.

[15] Such being the case, in absence of a more credible evidence, this court is not able to accept the averment that the convenient speed the board could act on the *Borang 1* was on the 16 November 2020. The dates are crucial as it would determine if the representation which was heard on 10 February 2021 with the recommendation made to YDPA on 15 February 2021 was well within the three months from the date of receiving the representation.

[16] Section 10(1) of the Act provides:

Section 10 Report of Advisory Board

(1) Whenever any person has made representations under subsection 9(1) to an Advisory Board, the Advisory Board shall within three months from the date of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow, consider the representations and make recommendations thereon to the Yang di-Pertuan Agong.

[17] Section 10 uses the word 'within three months from the date of receiving such representation'. For this reason, the respondent ought to have been aware the significance of the date and time. Furthermore, the Interpretation Act does not intend to eliminate the public holiday of saturday and sunday that sets in at the commencement of the said period. This means, the first saturday and sunday of 14 November 2020 and 15 November 2020 must be taken to form part of the three months calculation in s 10(1) of the Act.

[18] Section 54 of the Interpretation Acts 1948 and 1967provides as follows:

Section 54 Computation of time.

(1) In computing time for the purposes of any written law — A

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day; B

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and C

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time. D

...

[19] It is also relevant to highlight s 66 of the Interpretation Acts 1948 and 1967 which provides the definition of 'weekly holiday' as follows: E

'weekly holiday' means Sunday or, in States where Friday is observed as the weekly holiday, Friday.

[20] This court also found a similar interpretation provided in the s 2 of the Holidays Act 1951 which has the same definition to the word 'weekly holiday' as follows: F

'weekly holiday' means Sunday or, in States where Friday is observed as the weekly holiday, Friday.

[21] Nowhere in the said Interpretation Act nor the Holidays Act referred to by this court had stipulated that the first weekly holiday (being saturday) will be taken as 'excluded day'. Section 54 only caters for the last day being a weekly holiday to be termed as 'excluded day'. Therefore, for the respondent to argue that the first weekly holiday saturday and sunday to be eliminated from the calculation of the three months limitation under s 10(1) of the Act is not supported by any provisions of the law. G H

[22] Even taken the worst case that *Borang 1* was faxed very late in the evening (which this court says is unclear if it was faxed during the working hours of the board or not because insufficient facts), the three months calculation should begin from saturday 14 November 2020 and not 16 November 2020. Thus, when the board sat to hear the representation on 10 February 2021, it was the 89th day and the recommendation to YDPA on 15 February 2021 was therefore made beyond the three months permitted time I

frame under s 10(1) of the Act.

[23] This being the case, drives this court to conclude that there is merit on the first issue raised by the applicant without the need to deliberate on other complaints raised by the applicant. This moves this court to allow the writ of habeas corpus to be issued on this first issue alone. The applicant is ordered to be set free forthwith.

Application for writ of habeas corpus allowed; court ordered applicant to be set free forthwith.

Reported by Dzulqarnain Ab Fatar